

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

SEEDS OF PEACE COLLECTIVE,)
MICHAEL BOWERSOX, AND THREE)
RIVERS CLIMATE CONVERGENCE)
("3RCC"),)

Plaintiffs,)

v.)

CITY OF PITTSBURGH BUREAU OF)
POLICE; OFFICER SELLERS (Badge No.)
3602); OFFICER KURVACH (Badge No.)
3480); and OFFICER JOHN DOE 2 (Badge)
No. 3564),)

Defendants.

Civil Action No. 2:09-cv-1275

Hon. Gary L. Lancaster

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING
ORDER AND/OR PRELIMINARY
INJUNCTION**

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR TEMPORARY RESTRAINING ORDER
AND/OR PRELIMINARY INJUNCTION**

INTRODUCTION

This civil-rights lawsuit against the City of Pittsburgh Bureau of Police and several individually named police officers arises from the defendants' systematic attempts to conduct unlawful raids, searches, and seizures of plaintiffs' persons and property in order to harass and discourage lawful First Amendment activities by Plaintiffs *Seeds of Peace Collective* and *Three Rivers Climate Convergence* ("3RCC"). The two organizational plaintiffs are groups of demonstrators against the G-20 Summit being held in Pittsburgh on September 24-25, 2009. *Seeds of Peace* is one of several groups with buses that will be serving food for 3RCC's "climate camp" and "sustainability fair," which are political demonstrations that will be held in Point

State and Schenley Parks in Pittsburgh. Indeed, this Court issued a preliminary injunction in *CODEPINK v. U.S. Secret Service*, 09-cv-1235 (W.D. Pa., Lancaster, J.), on September 17, 2009, ordering the City of Pittsburgh to allow First Amendment activities in Point State Park on September 20-21. Since that court-issued injunction, however, City of Pittsburgh police have engaged in a pattern of illegal searches, vehicle seizures, raids, and detentions of *Seeds of Peace* members.

On Friday, September 18, 2009, the police illegally searched and seized a bus, known as the *Seeds of Peace* bus, in retaliation for the group's association with and intention to provide food and medical supplies to G-20 demonstrators. *Seeds of Peace* reclaimed its bus late Friday night, but only after being forced to pay a fee. Late on Sunday night, September 20, *Seeds of Peace* was preparing food to begin serving 3RCC's demonstrations on Monday, when more than thirty Pittsburgh police officers with semi-automatic weapons raided the private property in Lawrenceville where the *Seeds of Peace* and another food-preparation bus were parked. The police insisted on searching the property and the buses, but had no search warrant, and Plaintiffs refused consent to search the buses. Subsequently, Pittsburgh police detained for approximately an hour four *Seeds of Peace* members on loitering charges while they were walking to their residence. All four members were subsequently released without being charged or cited. This action for injunctive relief and damages results from the foregoing incidents.

FACTS

Plaintiffs incorporate by reference the factual allegations contained in the Verified Complaint.

ARGUMENT

This Court must weigh four factors to determine whether a preliminary injunction should be issued:

- (1) the likelihood that the moving party will succeed on the merits;
- (2) the extent to which the moving party will suffer irreparable harm without injunction relief;
- (3) the extent to which the moving party will suffer irreparable harm if the injunction is issued; and
- (4) the public interest.

Liberty Lincoln-Mercury Inc. v. Ford Motor Co., 562 F.3d 553, 556 (3d Cir. 2009); *McNeil Nutritionals LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 356-57 (3d Cir. 2007). The balance of factors in this First Amendment case clearly weighs in favor of granting the requested injunction.

PLAINTIFFS HAVE STANDING TO SEEK THE ISSUANCE OF A TRO/PRELIMINARY INJUNCTION.

As a preliminary matter, Plaintiffs have standing to seek a TRO/injunctive relief. A city or state law enforcement agency may be enjoined from committing constitutional violations where there is proof that officers within the agency have engaged in a persistent pattern of misconduct. *Md. State Conference of NAACP Branches v. Md. Dept. of State*, 72 F. Supp. 2d 560, 564-65 (D. Md. 1999) (distinguishing case from *Lyons* where pattern and practice evidence and likelihood of recurrence evidence is present); *DeShawn v. Safir*, 156 F.3d 340, 344-45 (2d Cir. 1998) (same); *Thomas v. County of Los Angeles*, 978 F.2d 504, 507- 508 (9th Cir. 1992) Here, plaintiffs have clearly alleged a persistent pattern and practice of police harassment and misconduct over the past few days and a realistic threat that such conduct will recur in the upcoming days.

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM BECAUSE THE DEFENDANTS' SURVEILLANCE AND HARASSMENT OF PLAINTIFFS ARE INTENDED TO RETALIATE AGAINST PLAINTIFFS FOR EXERCISING THEIR FREE-SPEECH AND FREE-ASSOCIATION RIGHTS.

Unlike typical preliminary injunction jurisprudence, Plaintiff notes that in First Amendment cases, it is the Defendants who carry the burden of both proof and persuasion. *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3d Cir. 1997) (en banc), *cert denied*, 522 U.S. 132 (1997) (noting that when a legislative body [a school board] acts to restrict speech, that body has the burden of proving that it is acting in a constitutional manner); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000) (“When the government restricts speech, the Government bears the burden of proving the constitutionality of its actions”) (citations omitted).

Although Defendants ordinarily are in the position to, and have the right to, conduct surveillance and searches that comply with the requirements of the Fourth Amendment, even otherwise constitutional surveillance and searches are unconstitutional if undertaken in retaliation for Plaintiffs’ engagement in constitutionally-protected conduct. *Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997) (“[A]n otherwise legitimate and constitutional government act can become unconstitutional when an individual demonstrates that it was undertaken in retaliation for his exercise of First Amendment speech.”) (citing *Mt. Healthy Sch. Dist. Bd. of Educ. V. Doyle*, 429 U.S. 274, 283 (1977)). Here, defendants’ surveillance and searches of plaintiffs’ persons and property are unconstitutional under the Fourth Amendment because they are not supported by probable cause or reasonable suspicion and under the First Amendment because the defendants’ actions are motivated by retaliation against plaintiffs’ exercise of their free-speech rights.

To prevail on a First Amendment retaliation claim, Plaintiff must prove that: (1) he engaged in constitutionally-protected activity; (2) the government responded with retaliation; and (3) the protected activity caused the retaliation.” *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004) (citations omitted).

The plaintiffs are participating in First Amendment-protected activities related to the G-20 Summit. Those First Amendment activities include the operation of a bus called *Seeds of Peace* that provides food support for demonstrators mobilizing in Pittsburgh during the week of the G-20 Summit and the International Coal Conference. Plaintiff Seeds of Peace Collective exists solely to provide logistical support and solidarity to groups engaged in peaceful demonstrations or protests. In addition to providing food and medical supplies, the group produces and displays signage that proclaims their sympathy, support, and solidarity with the goals and messages of the various protest groups. All of these gestures constitute First Amendment-protected verbal and non-verbal conduct because they are sufficiently imbued with elements of communication. *See Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 160-61 (3d Cir. 2002) (“conduct is expressive if, ‘considering the nature of [the] activity, combined with the factual context and environment in which it was undertaken, we are led to the conclusion that the activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments’”) (quoting *Troster v. Pa. State Dept. of Corrections*, 65 F.3d 1086, 1090 (3d Cir. 1995)).

The defendants have systematically harassed and surveilled the plaintiffs in retaliation for the plaintiffs’ attempt to exercise their First Amendment rights, including illegally searching and seizing the *Seeds of Peace* bus, raiding the property where the *Seeds of Peace* bus and another food-preparation bus were parked, and detaining members of the organizations on meritless

criminal charges. *See Anderson v. Davila*, 125 F.3d 148, 160-63 (3d Cir. 1997) (plaintiff stated viable claim against government where he alleged that government engaged in surveillance of him in retaliation for his exercise of First Amendment rights). All of those actions were taken for no other reason than to inhibit the plaintiffs' exercise of their First Amendment rights. *See id.* at 161 (plaintiff must prove that adverse governmental action was motivated by protected activity to prevail on retaliation claim); *see also McCurdy v. Montgomery County, Ohio*, 240 F.3d 512, 520 (6th Cir 2001) ("adverse state action 'motivated at least in part as a response to the exercise of the plaintiff's constitutional rights' presents an actionable claim of retaliation") (quoting *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998)). Although the Supreme Court has held that First Amendment rights cannot be chilled by "the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose," *see Laird v. Tatum*, 408 U.S. 1, 10 (1972), the defendants' actions have gone much farther than mere surveillance in this case and are designed to actually prevent the plaintiffs from exercising their free-speech rights in Pittsburgh during the week of the G-20, *see Anderson*, 125 F.3d at 160 (explaining that plaintiff articulates a "specific present harm" amenable to injunctive relief when he shows that government has retaliated in response to his exercise of protected activity under the First Amendment). For instance, the defendants' seizure of the *Seeds of Peace* bus served not only to harass plaintiffs and chill the exercise of their First Amendment rights, but also to prevent plaintiffs from carrying out their free-speech activities in Pittsburgh during the week of the G-20 by impeding their ability to feed and provide medical support to protestors. And defendants' raid on the property where the food-preparation buses were parked was designed to intimidate the owner of the property where the buses were parked so that he would revoke his

permission to the plaintiffs to park the buses there.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE COURT DECLINES TO ISSUE THE INJUNCTION.

As the Supreme Court has noted, “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (emphasis added); *see also Swartzwelder v. McNeilly*, 297 F.3d 228, 241-42 (3d Cir. 2002); *American Civil Liberties Union*, 217 F.3d 162, 180 (generally in First Amendment challenges plaintiffs who meet the merits prong of the test for a preliminary injunction “will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights.”) (citation omitted); *Abu-Jamal v. Price*, 154 F.3d 128, 135–36 (3d Cir. 1998) (same); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed.1995) (“When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”). In this case, the defendants have repeatedly attempted to impede plaintiffs’ exercise of their free-speech rights by intimidating plaintiffs and those who have allowed them to park their buses on their property, physically seizing the *Seeds of Peace* bus, and detaining members of the plaintiff organizations. Absent a court TRO/preliminary injunction, the plaintiffs will thus be irreparably and irretrievably precluded from engaging in constitutionally protected activity designed to bring attention to what they perceive as the global-changing polices of the G-20 nations.

III. DEFENDANTS WILL SUFFER NO IRREPARABLE HARM IF THIS INJUNCTION ISSUES.

The requested order will not prejudice the City’s ability to maintain public safety or security. The City can continue to protect public safety and the safety of world leaders without unconstitutionally infringing on the rights of peaceful demonstrators. If peaceful demonstrators, including the plaintiffs, begin to engage in illegal activity, at most, the City would have to

comply with the normal Fourth Amendment requirements, including obtaining a warrant before conducting a search or seizure. Requiring defendants to comply with the Constitution if such searches or seizures are necessary does not and cannot constitute irreparable harm. And because the Defendants are a governmental unit and its agents, they have no legally cognizable interest in suppressing plaintiffs' First Amendment rights or retaliating against them for the exercise thereof.

IV. GRANTING THE INJUNCTION WILL SERVE THE PUBLIC INTEREST

The free exchange of ideas in Pittsburgh's public spaces and forums is indisputably in the public interest. "[T]ime out of mind, public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). Enjoining the City from unduly and unfairly burdening political activities in Pittsburgh's public forums is in the public interest.

CONCLUSION

WHEREFORE, as Plaintiffs have satisfied the four pre-requisites for issuance of a preliminary injunction, this Court should issue a preliminary injunction to enjoin the Defendants along with their officers, employees, agents and assigns from engaging in retaliatory conduct against the Plaintiffs designed to chill the exercise of their First Amendment rights.

Respectfully submitted,

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